Supreme Court, U.S.
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No. 04-570

In The Supreme Court of the United States

MARY MARTIN,

Petitioner,

v.

BOYD GAMING CORPORATION d/b/a M/V TREASURE CHEST CASINO and TREASURE CHEST CASINO, LLC,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. A "vessel in navigation" under the Jones Act must have transportation over navigable waters as its primary function. Since Louisiana adopted dockside gaming on 1 April 2001, the M/V TREASURE CHEST has been legally prohibited from moving while conducting its primary function, casino gaming, and has moved only twice, for berth maintenance with its casino closed. How could the M/V TREASURE CHEST be a "vessel in navigation" under the Jones Act?

2. Jones Act seaman status is reserved for employees who regularly face "the special hazards and disadvantages" of those who go to sea, the "perils of the sea." The M/V TREASURE CHEST permanently moored more than six months before this petitioner's accident and petitioner, a cocktail waitress, no longer faced any hazards associated with a navigating vessel. Why should a cocktail waitress on a permanently moored casino boat enjoy the special remedies afforded seamen?

3. Federal maritime law applies to torts that occur on navigable waters (maritime situs) when the accident has a potentially disruptive impact on maritime commerce and a substantial relationship to traditional maritime activity (maritime nexus). This petitioner was injured onshore when she allegedly slipped in cooking grease leaking from garbage bags removed from a shoreside kitchen. How could petitioner claim a maritime situs and a maritime nexus in this case?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Treasure Chest Casino, L.L.C., a Louisiana limited liability company, d/b/a Treasure Chest Casino is owned by Boyd Louisiana, L.L.C. (85%) and Boyd Kenner, Inc. (15%). Respondent Boyd Gaming Corporation is a publicly traded company trading on the New York Stock Exchange under the symbol "BYD."

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INTRODUCTION

To qualify for seaman status, an employee must have a substantial employment-related connection to a "vessel in navigation." To qualify as a "vessel in navigation" under the Jones Act, a floating structure must have, as its primary mission, "the transportation of cargo, equipment or passengers over navigable waters." And vessel status can change: a vessel that was once in navigation can be withdrawn from navigation and lose its Jones Act vessel status.

On 1 April 2001, the M/V TREASURE CHEST was moored permanently and thus ceased to be "in navigation." Although the TREASURE CHEST retained many attributes of a traditional vessel, the TREASURE CHEST no longer had any significant transportation function. In fact, the vessel was prohibited from conducting its primary function, casino gaming, while moving, under both Louisiana law and its United States Coast Guard Certificate of Inspection. And the TREASURE CHEST has moved only twice since 1 April 2001; on 4 and 5 June 2002 for maintenance dredging of its berth with the casino shut down. The Fifth Circuit's holding that the TREASURE CHEST was not in navigation, and petitioner was not a seaman, when she was allegedly injured on shore on 7 October 2001 was therefore legally correct.

The Jones Act remedy is reserved for sea-based maritime employees who regularly face "the special hazards and disadvantages to which they who go down to sea in ships are subjected." Seaman status applies only to those workers who are regularly exposed to the "perils of the sea." The TREASURE CHEST had stopped navigating more than six months before this petitioner's accident, and

from that point on petitioner, a cocktail waitress, never faced the "perils of the sea." The special privileges reserved for seamen should not extend to a cocktail waitress on a casino vessel that never leaves the dock. This, too, establishes that petitioner was not a seaman at the time of her alleged accident.

In addition, because the TREASURE CHEST was not a vessel for Jones Act purposes, it also was not a vessel under the General Maritime Law. And petitioner's accident does not otherwise support maritime jurisdiction and the application of maritime law. Petitioner's accident occurred onshore, and there was no maritime situs. Moreover, her alleged slip and fall onshore, in kitchen grease leaking from garbage bags removed from a shoreside kitchen, had no potentially disruptive impact on maritime commerce and no substantial relationship to traditional maritime activity, *i.e.*, no maritime nexus. In short, petitioner lacked the bases for a maritime tort claim.

There is no reason for this Court to exercise its jurisdiction in this case. A petition for a writ of certiorari will be granted only for compelling reasons such as: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; or (b) a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an

important federal question in a way that conflicts with relevant decisions of this Court. U.S. Sup. Ct. Rule 10. The principal purpose for which this Court uses certiorari jurisdiction is to resolve conflicts among circuit courts of appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. U.S.*, 500 U.S. 344, 347, 111 S.Ct. 1854, 1857, 114 L.Ed.2d 385 (1991). None of these "compelling reasons" exist in the present case to warrant the involvement of this Court.

There is complete harmony in the circuit court opinions on the issue presented here. Two courts have addressed the issue: the Fifth Circuit in the present matter and the Seventh Circuit in *Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir.), *cert. denied,* 125 S.Ct. 373 (2004). Both courts reached the identical conclusion: that casino gaming vessels formerly engaged in regular navigation but now moored indefinitely for dockside gaming are no longer "vessels in navigation" for Jones Act seaman status. And the decisions do not present important questions of federal law, but merely applied established legal principles to nearly identical facts, which in the present matter are undisputed. Thus, there is no reason for this Court to grant a writ in this matter.

STATEMENT OF JURISDICTION

The jurisdictional statement of petitioner is incorrect: the lower courts did not have subject matter jurisdiction pursuant to 28 U.S.C. §§1331 and 1333, because they found that petitioner had no claims under the Jones Act, 46 U.S.C. §688, or under the General Maritime Law. There

is, in fact, no Federal subject matter jurisdiction pursuant to 28 U.S.C. §§1331 and 1333. And there is no diversity of citizenship (Treasure Chest Casino, LLC and Martin are both Louisiana citizens), so Federal jurisdiction is lacking altogether.

STATEMENT OF THE CASE

A. Statement of Facts

The following facts were and are undisputed:

Petitioner was employed as a cocktail waitress at the Treasure Chest Casino in Kenner, Louisiana, from early 1995 until her alleged slip and fall accident on a shoreside loading dock on 7 October 2001. Petitioner claims that, while walking to the casino to begin her shift, she slipped in kitchen grease that allegedly leaked from garbage bags removed from a shoreside kitchen to the loading dock. There was nothing maritime or vessel-related about the accident.

Respondents, Boyd Gaming Corp. and Treasure Chest Casino, LLC, a Louisiana limited liability company d/b/a Treasure Chest Casino (collectively hereafter "Treasure Chest"), own and operate the TREASURE CHEST, a casino gaming vessel built to comply with the design requirements of the Louisiana riverboat gaming laws. Specifically, the TREASURE CHEST carries a valid Certificate of Inspection from the United States Coast Guard, has a length of 213.5 feet, is paddlewheel driven, and replicates, as nearly as practicable, a Louisiana river borne steamboat passenger vessel of the 19th Century era.

See, LSA-R.S. 27:44(23).[1] From the inception of its business operations in September 1994 until 31 March 2001, the TREASURE CHEST conducted gaming cruises on the navigable waters of Lake Pontchartrain for 90 minutes out of every three hours of operation, weather permitting.

During the first extraordinary legislative session for the year 2001, the Louisiana Legislature abolished the cruise requirement for all riverboat casinos in Louisiana in exchange for increased franchise fees from the casino operators. Appendix to Petition for a Writ of Certiorari ("Pet. App.") at 14-19. Beginning on 1 April 2001, riverboat casinos, such as the TREASURE CHEST, were specifically required to conduct "dockside gaming." The riverboats were no longer required to leave the dock at specified intervals and, instead, could conduct gaming activities *only* while permanently moored. Pet. App. at 15.

Similarly, the United States Coast Guard prohibits the vessel from leaving its berth. On 31 July 2001, the United States Coast Guard issued an Amended Certificate of Inspection that allows for vessel operations only in a "continuously moored" status. The vessel's current Certificate of Inspection, effective through 31 July 2007, also provides that vessel operations are to be conducted only in a "continuously moored" status.

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[1] In *Chase v. Louisiana Riverboat Gaming Partnership*, 709 So.2d 904, 911 (La. App. 2nd Cir. 1998), the court concluded that the definition of a "vessel" under the Louisiana gaming laws has an entirely different context and purpose than the meaning of a vessel for Jones Act purposes, and the determination of vessel status under the Jones Act and the General Maritime Law will not be influenced by the state's licensing scheme.

Since 1 April 2001, the TREASURE CHEST has conducted all of its gaming operations at dockside. With one exception, the TREASURE CHEST has remained permanently moored in her protected berth on Lake Pontchartrain since 1 April 2001. On the evenings of 4 and 5 June 2002, the TREASURE CHEST was closed for several hours each night, and was moved approximately 200 feet from her permanently moored location to allow for maintenance dredging of her berth. Neither patrons, games dealers nor cocktail waitresses (like petitioner) were aboard the vessel when the dredging operations took place and the vessel was moved. From 1 April 2001, the TREASURE CHEST never moved with petitioner onboard. Treasure Chest has no intention to resume gaming cruises and anticipates that the vessel will remain permanently moored at its current location for the indefinite future.

B. Decision of the lower courts

Martin sued Treasure Chest in the United States District Court for the Eastern District of Louisiana on 4 October 2002, alleging that she was a seaman and member of the crew of the TREASURE CHEST and asserting a negligence claim under the Jones Act, 46 U.S.C. §688, and an unseaworthiness claim under the General Maritime Law. On 26 March 2003, the district court granted summary judgment dismissing Martin's claims on the basis that Martin was not a seaman as a matter of law, because the undisputed material facts established that the TREASURE CHEST, although clearly a vessel, was no longer "in navigation," a fundamental requirement of Jones Act seaman status, when Martin was allegedly injured. *Martin v. Boyd Gaming Corp.*, 252 F. Supp. 2d 321 (E.D. La. 2003); Pet. App. at 5-11. The court concluded

that the TREASURE CHEST had been withdrawn from navigation when it began dockside gaming on 1 April 2001, and that the employees' Jones Act status was withdrawn at the same time. *Id.* at 324; Pet. App. at 10-11. And because the casino boat was not a "vessel in navigation," the court refused to let plaintiff amend her complaint to sue Treasure Chest for negligence under the General Maritime Law. Pet. App. at 4, n.1.

Martin appealed the district court's orders granting summary judgment and denying leave to amend to the United States Court of Appeals for the Fifth Circuit, but the Fifth Circuit affirmed. *Martin v. Boyd Gaming Corp.*, 374 F.3d 375 (5th Cir. 2004); Pet. App. at 1. The Fifth Circuit held that once the TREASURE CHEST was withdrawn from navigation so that transporting passengers, cargo or equipment on navigable water was no longer an important part of the business in which the craft was engaged, the craft was not a vessel. 374 F.3d at 377; Pet. App. at 3. It was clear to the court that the TREASURE CHEST had no transportation function in the performance of its mission as a gambling casino because, after 1 April 2001, the TREASURE CHEST was securely moored during all gaming activity conducted by her customers. *Id.* The court concluded that the district court correctly granted summary judgment. *Id.*; Pet. App. at 4.

The Fifth Circuit also held that the district court correctly denied Martin's motion to amend her complaint to assert a claim against her employer under the General Maritime Law. *Id.* at n.1. The court agreed with the district court that because the TREASURE CHEST is not a vessel in navigation under the Jones Act, it is likewise

not a vessel under the General Maritime Law, foreclosing a General Maritime Law claim.[2]

REASONS FOR DENYING THE PETITION

There is complete harmony in the circuit court opinions on the issue presented here. The United States Courts of Appeals for the Fifth and Seventh Circuits agree that continuously moored riverboat casinos that serve no transportation function are not "vessels in navigation." In *Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir.), *cert. denied,* 125 S.Ct. 373 (2004), the Seventh Circuit held that a riverboat casino engaged in dockside gaming, which is fully capable of navigating but serves no transportation function and is indefinitely moored to a dock, is not a "vessel in navigation" so as to confer seaman status on any employee of the casino within the meaning of the Jones Act. The holding of the Seventh Circuit is in complete accord with the ruling of the Fifth Circuit in this action. Pet. App. at 1-4. The material facts presented by both cases are indistinguishable. No other United States Court of Appeals or district court has handed down a contrary ruling on the facts presented here. Nor has any state court of last resort.

[2] The court also held that the lack of vessel status precluded plaintiff from asserting a vessel negligence claim under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§901, 905(b). Moreover, the court had previously concluded that casino vessel workers were exempted from LHWCA application under the recreational vessel exclusion in §902(3)(B) of the Act. *Boomtown Belle Casino v. Bazor*, 313 F.3d 300 (5th Cir. 2002), *cert. denied*, 540 U.S. 814, 124 S.Ct. 65, 157 L.Ed.2d 29 (2003).

Martin now asks this Court to create a "backdoor" in which non-maritime employees such as Martin, working on continuously moored riverboat casinos, can enjoy the benefits of seaman remedies where none exist. For the reasons cited by the district court and the Fifth Circuit in the present case, and by the Seventh Circuit in *Howard*, Martin's petition for a writ of certiorari should be denied.

I. Martin does not satisfy *Chandris* for Jones Act seaman status because her employment duties did not expose her to the special hazards of the sea.

This Court's two most recent cases to address seaman status – *Chandris* and *Papai* – have made clear that the special privileges afforded seamen are reserved for those whose employment exposes them to the sea's "special hazards and disadvantages." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 370, 115 S.Ct. 2172, 2190, 132 L.Ed.2d 314 (1995). A fundamental part of the inquiry into whether a particular individual qualifies as a Jones Act seaman is a determination of whether the employee's duties "take that employee to sea." *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 555, 117 S.Ct. 1535, 1540, 137 L.Ed.2d 800 (1997). In *Chandris*, this Court explained:

> In defining the prerequisites for Jones Act coverage, we think it preferable to focus upon the essence of what it means to be a seaman. . . . The Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to "the special hazards and disadvantages to which they who go down to sea in ships are subjected."

515 U.S. at 369-70, 115 S.Ct. at 2190, citing *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104, 66 S.Ct. 872 (1946).

Thus, seaman status applies only to those workers who regularly face the "perils of the sea." *In re Endeavor Marine Inc.*, 234 F.3d 287, 291 (5th Cir. 2000), citing *Papai*, 520 U.S. at 554-55, 117 S.Ct. at 1540. At minimum, this requires a vessel that regularly navigates. *Id.* In the wake of *Chandris* and *Papai*, courts have concluded that employees who spend their time working aboard moored or docked vessels are not exposed to the perils of the sea and are not seamen. *See, e.g., Schultz v. Louisiana Dock Company*, 94 F. Supp. 2d 746, 750 (E.D. La. 2000); *Jones v. Daybrook Fisheries, Inc.*, 2001 WL 1502336 (E.D. La. Nov. 20, 2001).

The fact that petitioner was once a seaman does not mean she is always a seaman. This Court has instructed that "[i]f a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position." *Chandris*, 515 U.S. at 372, 115 S.Ct. at 2191-92. The same is true when the vessel's status changes. *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 190-91, 72 S.Ct. 216, 218, 96 L.Ed. 205 (1952). Thus, even if Martin's job duties did not change, the fact that she no longer performed those duties at sea precludes her from claiming seaman status based on her "prior service at sea." *Chandris, supra.*

Martin stopped "going to sea" on 1 April 2001 when the TREASURE CHEST stopped conducting gaming cruises and moored permanently. Although Martin's duties did not change, this change in the vessel's operations

affected a change in Martin's status. Thus, on 1 April 2001, petitioner received a permanent new work assignment that kept her at the dock, and her seaman status must be based on her work following that change in assignments. *Chandris, supra*. When Martin permanently ceased going to sea, she lost entitlement to the unique remedies reserved for seamen.

Petitioner's claim that she was a seaman because she was exposed to uniquely maritime perils, such as fire, is erroneous. Pet. at 20-21. The perils to which petitioner was exposed as a cocktail waitress on board the moored TREASURE CHEST were no different than those to which any other non-seaman dockside worker is exposed; those "perils" were not even uniquely maritime. Fire is no more a threat to employees on the TREASURE CHEST than to workers in any other building having limited ingress and egress, such as nightclubs, hotels, restaurants, and office buildings. There was no danger of the TREASURE CHEST sinking with petitioner onboard, as recognized by the Coast Guard in authorizing the removal of the TREASURE CHEST's lifeboats. The threat posed by waterborne terrorists is no greater with the TREASURE CHEST than it would be for any waterfront structure. Even the threat of collision/allision is not significantly greater than that for any riverfront structure (the M/V BRIGHT FIELD's allision with the Hilton Riverside Hotel and Riverwalk Mall in New Orleans in December 1996 comes to mind).

In sum, after 1 April 2001, Martin did not go to sea and was not subjected to those "special hazards and disadvantages" that seamen encounter. She was a land-based worker aboard a permanently moored riverboat

casino. Therefore, the courts below correctly held that she was not a seaman as a matter of law.

II. The vessel analysis used by the Fifth Circuit to determine vessel status correctly recognized that a connection with a "vessel in navigation" is essential to seaman status.

Petitioner contends that the Fifth Circuit erred by allegedly applying a "putative" vessel analysis to this case. Pet. at 14. Petitioner focuses primarily on the first factor in the so-called "putative" vessel analysis, whether the "structure is constructed to be used primarily as a work platform." Pet. at 16. Petitioner argues that the M/V TREASURE CHEST casino was not originally built to be a "work platform," but was built as a Coast Guard licensed riverboat. Pet. at 17. As such, petitioner contends, the Fifth Circuit used an incorrect analysis in regards to the TREASURE CHEST. Pet. at 17-18.

But petitioner's focus is unduly narrow. As this Court has recognized, vessel status depends not on the original purpose for which a craft was built, but on its purpose and function when the alleged accident occurred. In *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 72 S.Ct. 216, 96 L.Ed. 205 (1952), an employee of a company that ran a seasonal boat rental operation was killed while working on the boats, which were stored on land for the winter. This Court held that the decedent was not a seaman within the meaning of the Jones Act, because "[t]here was no vessel engaged in navigation at the time of the decedent's death." *Id.* at 191. "The fact that he had been, or expected in the future to be, a seaman does not render maritime work which was not maritime in its nature." *Id.* (quoting *Antus v. Interocean S.S. Co.*, 108 F.2d 185, 187 (6th Cir. 1939)).

Once the ships were out of navigation, the employee lost his status as a seaman.

The court below has previously applied this rule, without challenge from this Court. Thus, in *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F.2d 393 (5th Cir. 1989), the Fifth Circuit held that a barge that was originally navigable, but was permanently moored to provide painting services and was seldom moved, was not a "vessel" within the meaning of the Jones Act or the Longshore and Harbor Workers' Compensation Act:

> The barge at issue in this case was used primarily as a work platform. Additionally, it was moored at the time of the accident; and any transportation function it performed was merely incidental to its primary purpose of serving as a work platform. It was not, however, constructed as a work platform. Nonetheless, the district court correctly concluded that the barge was not a vessel for Jones Act purposes.

Id. at 395. And in the *Pavone* case, the case on which petitioner claims the Fifth Circuit improperly relied (Pet. at 14), the court acknowledged that the purpose for which the barge supporting the casino was constructed was "not a key factor given *Ducrepont*'s recognition that original construction as a work platform is not a prerequisite." *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995). This rule is consistent with *Desper* and was correctly applied in the courts below.

Thus, petitioner's attempt to distinguish *Pavone* on the grounds that the TREASURE CHEST was originally designed and constructed as a navigating vessel is unavailing. Pet. at 17-18. As the Fifth Circuit stated, the rule has never been "once a vessel, always a vessel." 374 F.3d at 377;

Pet. App. at 3. Once the TREASURE CHEST was withdrawn from navigation, so that transporting passengers, cargo or equipment on navigable water was no longer an important part of the business in which the craft was engaged, the craft was no longer a vessel "in navigation." *Id.* The purpose for which the TREASURE CHEST was originally built and used, while to some degree relevant, does not overcome the fact that as of 1 April 2001, the TREASURE CHEST ceased to have transportation over water as a significant part of its function as a gaming vessel, and was not "in navigation."

The Seventh Circuit used the same analysis in determining that a riverboat casino very much like the TREASURE CHEST, which was indefinitely moored for dockside gaming, was not a vessel in navigation. In *Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir. 2004), the Seventh Circuit held that, "[I]n order for a vessel to satisfy the navigation requirement, the purpose of the vessel must to some reasonable degree be the transportation of passengers, cargo, or equipment from place to place across navigable waters." *Id.* at 857 (internal quotations omitted). The court noted that the purpose of the casino was not to move cargo or people but merely to provide a legal venue under Illinois law for gambling. *Id.* The court held that "an indefinitely moored dockside casino with no transportation function or purpose is not a vessel 'in navigation.'" *Id.* "In applying this test, courts will need to examine, among other factors, the current use of the vessel and the question whether the owner intends to move the structure on a regular basis and the length of time the structure has remained stationary." *Id.* at 858 (internal citations and quotations omitted). This Court denied the petition for writ of certiorari. 125 S.Ct. 373 (2004).

The analysis used by the Fifth and Seventh Circuit Courts of Appeals looks at whether the casino's current, primary use involves transportation. That is and was the legally proper approach. In this case, the undisputed facts established that the TREASURE CHEST had no transportation function when petitioner was allegedly injured. There is no issue for this Court to resolve, and it should deny petitioner's writ application.

III. The Fifth Circuit correctly concluded that, because the Treasure Chest was not "in navigation" for purposes of the Jones Act, it was not a "vessel" for purposes of the General Maritime Law.

Petitioner contends that the Fifth Circuit erred in declaring that, because the vessel was not "in navigation" for purposes of the Jones Act, it likewise was not a "vessel" for purposes of the General Maritime Law. Pet. at 14. However, this Court has made the very same association between the Jones Act and General Maritime Law:

> Since . . . the S. S. Harry Lane was not a vessel in navigation, it follows that there was no warranty of the ship's seaworthiness. This limitation is analogous to that applied in libels under the Jones Act, 46 U.S.C.A. §688, where it has long been held that recovery is precluded if the ship involved is not a vessel in navigation.

Roper v. U.S., 368 U.S. 20, 23-24, 82 S.Ct. 5, 7-8, 7 L.Ed.2d 1 (1961) (citations omitted) (finding that a ship withdrawn from navigation in 1945, and in 1954 utilized as a grainery or mobile warehouse, which was filled and moved out of the way by tug, and then returned by tug to a grain

elevator and unloaded, had not been converted into a vessel in navigation).

Petitioner maintains, nonetheless, that, under 1 U.S.C. §3, the definition of "vessel" under the General Maritime Law is broader than under the Jones Act, and that the absence of a transportation function is not fatal to a general maritime tort claim. That is simply untrue. It has long been a general rule that vessels were defined "in a very broad sense, to include all navigable structures *intended for transportation.*" *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 629, 7 S.Ct. 336, 338, 30 L.Ed. 501 (1887) (emphasis added). "The fact that it floats on the water does not make it a ship or vessel." *Id.* at 627.

Even back in 1926, this Court recognized that permanently moored structures like the TREASURE CHEST would not be considered vessels under 1 U.S.C. §3:

> The only question presented is whether appellant's wharfboat was a 'vessel' at the time it sank. It was an aid to river traffic, but it was not used to carry freight from one place to another. It was not practically capable of being used as a means of transportation. It served at Evansville as an office, warehouse, and wharf, and was not taken from place to place. The connections with the water, electric light, and telephone systems of the city evidence a permanent location. It performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to the land. It did not encounter perils of navigation to which craft used for transportation are exposed.

Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co., 271 U.S. 19, 22, 46 S.Ct. 379, 380, 70 L.Ed. 805 (1926) (holding that seasonal movement of a moored, floating structure was not sufficient to confer vessel status). In short, if it floats but does not move, it is not a vessel under the General Maritime Law.

Petitioner's contention that a conflict exists among the First, Second, Fifth and Seventh Circuit Courts of Appeals as to what constitutes a "vessel" under 1 U.S.C. §3 and the General Maritime Law is also untrue. Pet. at 10. Those courts all recognize that the transportation or navigation function of a craft determines whether the craft is a "vessel" under either the Jones Act or the General Maritime Law. *See, Powers v. Bethlehem Steel Corp.*, 477 F.2d 643, 646-471 (1st Cir.), *cert. denied*, 414 U.S. 856, 94 S.Ct. 160, 38 L.Ed.2d 106 (1973) ("Recovery under the Jones Act or under the general maritime law for unseaworthiness requires affiliation with a 'vessel' . . . We believe the raft upon which [plaintiff] was injured was not a vessel. . . . The purpose and business of the present craft was not the transportation of passengers, cargo, or equipment from place to place across navigable waters."; holding that floating construction platform secured to land is not a "vessel" for purposes of either the Jones Act or General Maritime Law); *Tramutola v. City of New York*, 104 F.3d 356, 1996 WL 687983 (2nd Cir. 1996) (unpublished opinion) ("[Plaintiffs] failed to establish that [injured plaintiff] was employed in connection with a 'vessel in navigation,' as required for recovery under the Jones Act and general maritime law."); *Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F.3d 379, 387 n.8 (7th Cir. 2001) ("[Defendant] also argues that there is no substantial relationship to traditional maritime activities because the riverboat casino is

not a vessel under maritime law. However, for these purposes a craft is a vessel if its purpose is to some reasonable degree the transportation of passengers, cargo, or equipment from place to place across navigable waters."; holding riverboat casino was a vessel where the casino was required by state law to navigate the river whenever it hosted gambling activities). Although application of these basic principles to differing facts may yield different results, there is no disagreement among the circuits that a transportation function is essential to vessel status.

Faced with this uniformity, petitioner struggles to fashion an argument that would warrant the involvement of this Court. Even if this Court were to entertain the argument that a vessel not "in navigation" for purposes of the Jones Act may be a "vessel" for purposes of the General Maritime Law, it does not change the fact that petitioner lacks any basis for a court to exercise maritime tort jurisdiction in this case. In order to maintain maritime jurisdiction, the tort must have both a maritime situs and a maritime nexus. To meet these requirements, the wrong must occur on navigable waters plus it must bear a significant relationship to traditional maritime activity. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268, 93 S.Ct. 493, 504 (1972).

The petitioner's accident had neither a maritime situs nor a maritime nexus. "A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S.Ct. 1043, 1048 (1995). Petitioner's accident occurred on shore, not on navigable waters. Moreover, the accident was not caused in any way by a vessel on navigable water, but by

cooking oil allegedly leaking from garbage bags removed from a shoreside kitchen to a shoreside loading dock. The fact that petitioner was en route to her job aboard the TREASURE CHEST could potentially satisfy the requirement of a maritime situs only if the TREASURE CHEST was a vessel under the General Maritime Law, which it was not. Thus, applying even the most liberal jurisdictional reach, Martin does not satisfy the situs requirement.

Nor does her alleged accident have a maritime nexus. The nexus test looks first to whether the "general features of the type of incident" had a potentially disruptive impact on maritime commerce, and second, to "whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1118-19 (5th Cir. 1995) (citing *Grubart*, *supra*). Neither the petitioner's accident nor the activities giving rise to it meet these criteria. A slip and fall onshore in grease leaking from garbage bags removed from a shoreside kitchen has no potentially disruptive impact on maritime commerce and no relation whatsoever to traditional maritime activities. Moreover, the general character of the activity giving rise to the incident – maintaining the safety of a shoreside loading dock – does not bear "a substantial relationship to traditional maritime activity." *Coats*, *supra*. The requisites for maritime jurisdiction are, therefore, completely lacking here. *Id.*

For these reasons, the courts below were well within their broad discretion in refusing to allow Martin to amend her complaint to state a general maritime tort claim. The requisites for maritime jurisdiction and the

application of the General Maritime Law are lacking in this case.

CONCLUSION

In conclusion, the lower courts correctly held that the TREASURE CHEST was no longer a vessel "in navigation" when it ceased navigating to conduct dockside gaming on 1 April 2001. From that date forward, transportation over navigable waters no longer played any part in the TREASURE CHEST's performance of its primary function. Thus, petitioner was not a seaman when she was allegedly injured in October 2001, and her claims under the Jones Act and General Maritime Law were properly rejected. For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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